

Illinois Commerce Commission
Initiative on Plug-In Electric Vehicles

Workshop 5 – Final Report
Developing a Petition to the Commission to clarify the
legal status of public charging stations.[1]

December 30, 2011

Introduction

The Illinois Commerce Commission (ICC or Commission) Initiative on Plug-In Electric Vehicles (PEVs), invited stakeholders to participate in informal workshops.

This workshop considered the issue of, “Developing a petition to the Commission to clarify the legal status of public charging stations.”

More specifically the Commission asked the workshop to consider the following:

“There has been general agreement among parties to the Commission’s Initiative on Plug-In Electric Vehicles that publicly-available charging stations should be deemed competitive services and therefore not be considered as public utilities. Many commenters requested a declaratory statement from the Commission to this effect, but the Commission does not appear to have authority under the Public Utilities Act to make a binding declaration on its own initiative.

“Under Title 83, Section 200.220 of the Illinois Administrative Code, parties may petition the Commission for a declaratory ruling with respect to the applicability of any statutory provisions enforced by the Commission. If workshop participants are interested in pursuing this path, they may work together to agree on the content of the petition and to select a party to make the filing.”

Does a Petition for Declaratory Ruling filed with the ICC present a tenable option for the Commission to make a determination regarding the public utility status of public charging stations?

Part 200.220 (83 ILAC 200.220) of the Commission's rules of practice provides for Petitions for declaratory relief to be filed by persons affected by the applicability of any statutory provision enforced by the Commission. Part 200.220(j) clarifies that a declaratory ruling only has a binding legal effect on the party making the filing. This provision is a reflection of the principle that Commission orders are not *res judicata* binding upon future matters brought before the Commission. Further, note that in *Mississippi River Fuels v. Illinois Commerce Commission*, the Supreme Court of Illinois commented that an ICC Order determining that an entity was not a public utility did not restrict the Commission from later changing its mind. 1 Ill.2d 609, 512; 116 N.E.2d 394, 396 (1953). Nevertheless, a petition for a declaratory ruling filed individually or jointly, by any stakeholder, can be filed as a matter of right.

To encourage the proliferation of EV charging stations in Illinois, the state requires clear adoption of a uniform policy on the legal status of Electric Vehicle Equipment and Service Providers (EVESPs) who are currently developing charging networks in collaboration with public and private property owners across the US, internationally, and increasingly in Illinois. EVESP industry stakeholders believe that early adoption of charging stations elsewhere has resulted from clarity and collaboration between EVESPs and government to provide the entrepreneurial flexibility needed for EVESPs to succeed and lay the foundations for a broad EV charging network.

In Illinois, regulation of EVESPs as public utilities or as RESs solely on the basis of their providing EV charging services would restrict their ability to function as competitive entities. Further, a regulatory system that recognized any entity selling electricity for transportation fuel as a public utility or RES could lead to unintended or undesirable scenarios. For example, conventional auto repair centers and towing services regularly recharge dead car batteries. If a vehicle using any type of electric propulsion system received a charge from one of these companies, the provider could effectively be classified as a public utility or RES.

In contrast, explicitly clarifying that an EVESP will not be regulated as a utility or RES if it is acting as a customer of a utility or RES could clear the path for more private investment in the industry. As has been noted in the current workshop, when an EVESP is connected to the customer side of the meter, it is no different than a hotel, apartment, or other property owner furnishing electricity, and these entities are not regulated as utilities. When an EVESP is connected to the customer side of the meter, it differs from traditional public utilities and RESs regarding the type of service it provides. In such cases, the primary function of an EVESP is to sell a service, not electricity. The role of an EVESP in this case is to facilitate easy access to charging stations rather than to distribute or sell power.

Across the US, state legislatures are adopting laws to clarify the legal status of EVESPs and promote rapid development of an EV charging network. For example, California recently adopted AB 631 into law, which states that “The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge light duty plug-in electric vehicles does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, control, operation, or management.” §216 (i). Similarly, Minnesota law states that a “Public utility” . . . does not include . . . a retail seller of electricity used to recharge a battery that powers an electric vehicle, as defined in section 169.011, subdivision 26a, and that is not otherwise a public utility under this chapter.” Statute 216B.02, Subdivision 4.[2]

The Citizens Utility Board (“CUB”) believes that at this time, PEVs are the functional equivalent of any other consumer appliance, therefore the Commission likely does not have jurisdiction on this issue. Given the small scale of PEV adoption likely to occur over the next few years, and the low demand profile of most Level 1 and Level 2 charging stations, CUB sees no reason to preliminarily classify charging stations and any related infrastructure. As the Commission better understands how PEV infrastructure will impact the distribution utility, including what demands for public charging infrastructure are anticipated, the Commission can revisit the question of whether it needs to classify this infrastructure in any way different than existing distribution infrastructure. Before making any designation the Commission should consider the impact on its ability to regulate the behavior of the utility, the customer, and the infrastructure service provider.

The workshop participants recognized that a declaratory ruling might not resolve all potential questions that could be applicable to the Commission’s jurisdiction over charging stations. Further, as noted above, the ruling might apply only to the party submitting the petition, and the Commission could conceivably arrive at a different conclusion if asked to rule on a different question. Given these potential disadvantages of a single party seeking a declaratory ruling, the participants discussed how the regulatory status of charging stations could be definitively resolved. The workshop participants agreed that legislation pertaining to charging stations adopted by the General Assembly would be the most direct way to determine the extent, if any, of the Commission’s jurisdiction over charging stations.

However, this consensus is not unanimous. In particular, it is CUB’s position, as detailed in its attached comments, that it is premature at this time for the ICC to take any action on the legal status of charging stations.

In addition, it is the recommendation of the workshop participants (except the timing as noted by CUB) that the Commission coordinate with the Illinois Electric Vehicle Advisory Council to explore recommending new state legislation, promoting uniformity of policies and laws assuring the continued development of an accessible and convenient EVESP charging network throughout Illinois supported by open and competitive markets. [3]

Notes

[1] **Disclaimer:** This report is for discussion purposes only, intended to be in furtherance of the goals of the PEV workshop. This is not intended as a legal opinion and should not be relied upon as legal advice or counsel. Parties with legal questions or concerns should consult an attorney with regards to the matters discussed in this report. The conclusions expressed here are subject to change and not intended as any commitment or waiver of rights on behalf of Any Party.

[2] In Washington, chapter 80.28 RCW 25 also exempts EVESPs from the state's public utility regulations; however, it is noted that the Washington law broadly provides that the State "shall not regulate the rates, services, facilities, and practices" of EVESPs, which could be interpreted as exempting an EVESP in Washington from *any* future regulation rather than simply from regulation as a utility. To avoid limiting Illinois' ability to act as necessary in the future, it would be more practical and more prudent to state simply that providing EV charging services does not by itself subject a business to utility regulation.

[3] If the General Assembly were to take up this issue, consideration should be made for an EVESP exemption under the Public Utilities Act for EVSP companies that simply wish to act as customers of utilities or RESs.